

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

IOWA PROTECTION AND
ADVOCACY SERVICES, INC.,

Plaintiff,

vs.

GERARD TREATMENT PROGRAMS,
L.L.C.,

Defendant.

No. C 01-3013-MWB

**ORDER REGARDING MOTIONS TO
MODIFY, ALTER, OR AMEND;
LIFTING STAY; AND DIRECTING
ISSUANCE OF MODIFIED
PRELIMINARY INJUNCTION**

This matter comes before the court pursuant to plaintiff IPAS's July 9, 2001, motion for modification of ruling and defendant Gerard's July 9, 2001, motion to alter or amend judgment and/or for additional time to file a motion under Rule 59(e). The parties' motions are directed at the court's order of June 25, 2001, published at *Iowa Protection & Advocacy Servs., Inc. v. Gerard Treatment Programs, L.L.C.*, ___ F. Supp. 2d ___, 2001 WL 720631 (N.D. Iowa June 25, 2001), which granted, but stayed, a preliminary injunction requested by IPAS enjoining Gerard from preventing IPAS's access to residents, records of residents, and facilities of Gerard pursuant to 42 U.S.C. § 6042 (repealed, revised, and recodified at 42 U.S.C. § 15043) (specifying the right of access of a protection and advocacy agency (P & A) to records and facilities of institutions providing services to "developmentally disabled individuals") and 42 U.S.C. § 10805 (specifying a P & A's right of access to records and facilities of institutions providing services to "mentally ill individuals"), where IPAS satisfies certain requirements. The court will consider the parties' motions in turn.

However, before doing so, the court notes that, in its June 25, 2001, order, the court stayed the preliminary injunction until July 25, 2001, to allow parents and guardians of

residents of Gerard who objected to IPAS's access to intervene and move to reconsider the court's determination that IPAS is entitled to access to residents and their records pursuant to the statutes cited above, even if the parents or guardians of such residents object to such access. The order further provided as follows:

Parents or guardians of residents of Gerard who do not consent to access by IPAS shall have **to and including July 13, 2001**, to move the court for leave to intervene in this action for the purpose of moving the court to reconsider its conclusions herein. **Not later than July 2, 2001**, the parties shall jointly provide notice of this ruling to the parents, guardians, or guardians ad litem of residents at the Gerard facility in Mason City, Iowa, who either (a) have expressly stated to either IPAS or Gerard that they do not want IPAS to have access to the resident for whom they are responsible or that resident's records; or (b) have not yet responded to IPAS's request for consent for IPAS to obtain access to a resident or a resident's records.

Iowa Protection & Advocacy Servs., Inc., ___ F. Supp. 2d at ___, 2001 WL 720631 at *25 (emphasis in the original). No parents or guardians of residents have filed timely motions for leave to intervene in this action for the purpose of moving the court to reconsider its conclusions in the June 25, 2001, order. In the absence of any such motions to intervene, the reasons for the stay on the preliminary injunction are mooted and the court concludes that the stay should be lifted and the preliminary injunction, incorporating any modifications or alterations necessitated by the parties' present motions, should now issue.

IPAS's motion for modification is based on 42 U.S.C. § 15043, which superseded 42 U.S.C. § 6042. However, most of IPAS's contentions in its motion for modification are mooted by the failure of any parents or guardians to file timely motions to intervene and the court's conclusion that the time is now ripe for the issuance of the preliminary injunction. As to contentions that are not mooted, IPAS contends that, because the "new" statute prescribes that a P & A like IPAS must be given access to records within twenty-four hours

in the event that the P & A has made a probable cause determination or in the case of death of an individual with a developmental disability, see 42 U.S.C. § 15043(a)(2)(J)(ii), the court should amend its order to provide for immediate access to comply with the twenty-four hour requirement. In a companion argument, IPAS argues that, under the applicable statutes and regulations, there is no requirement that IPAS provide notice to Gerard or legal guardians of residents before obtaining access to records or residents when IPAS concludes there is probable cause to suspect on-going abuse or neglect. These arguments are largely unpersuasive. The “new” statute applicable to developmentally disabled individuals, 42 U.S.C. § 15043(a)(2)(J)(ii), expressly makes access to records, even in cases involving death or a probable cause determination, contingent upon a “request” from the P & A for such access and establishes a maximum period of twenty-four hours for compliance. The notice requirement in the preliminary injunction merely formalizes the form of the request and establishes a notice period equivalent to the maximum period for compliance with a request for access allowable under the “new” statute. Similarly, both the “new” statute and 42 U.S.C. § 10805, which applies to mentally ill individuals, make access to records of individuals who have a legal representative, even in the case of a probable cause determination, contingent upon satisfaction of requirements for contact with the representative, an offer of assistance, and the representative’s failure or refusal to act. See 42 U.S.C. § 15043(a)(2)(I)(iii)(I)-(III); 42 U.S.C. § 10805(a)(4)(C)(i)-(iii). The notice requirement in the preliminary injunction merely formalizes the manner in which IPAS demonstrates compliance with the requirements of these statutes. The only modification required, in light of the “new” statute, is that paragraph 3(a) of the preliminary injunction should be modified to provide that Gerard must provide access to records “within twenty-four hours of presentation of the prescribed notice,” instead of “as promptly as circumstances reasonably permit.”

Therefore, the court will deny IPAS’s request for modification except as to the

specified modification of paragraph 3(a) of the preliminary injunction.

In support of its motion to alter or amend, Gerard contends that 42 U.S.C. § 6042(a)(2)(I)(iii) (now 42 U.S.C. § 15043(a)(2)(I)(iii)) and 42 U.S.C. § 10805(a)(4)(C) only provide IPAS with access to records of an individual who has a legal guardian, conservator, or legal representative when IPAS has made a probable cause determination. However, Gerard contends that “parents” do not fall within the definition of “legal guardian, conservator, or legal representative” established in 42 C.F.R. § 51.2 and 45 C.F.R. § 1386.19. Accordingly, Gerard requests “clarification” of whether or not the statutory provisions cited also pertain to access to records of individuals with “parents,” but no guardian, conservator, or legal representative as defined in the regulations. The court finds that, even if “parents” are not within the meaning of legal guardians, conservators, or legal representatives in the statutory provisions cited, IPAS is still entitled to access to records of individuals who have only “parents” when a probable cause determination has been made pursuant to 42 U.S.C. § 15043(a)(2)(I)(ii) (access to records of an individual upon a probable cause determination when “the individual does not have a legal guardian, conservator, or other legal representative”) and 42 U.S.C. § 10805(a)(4)(B) (same). Therefore, no clarification is required at this time, because nothing in the statutory ambiguity Gerard perceives changes IPAS’s right of access to records of individuals with only “parents.”

Gerard’s alternative motion for an extension of time to and including July 16, 2001, within which to respond to any motion filed by the plaintiff or to respond to or join in any motions to reconsider filed by any intervening parents or guardians is mooted by the court’s disposition of IPAS’s motion, above, and the failure of any parents or guardians to move to intervene in this action. Therefore, the court concludes that Gerard’s alternative request for an extension of time should be denied.

THEREFORE,

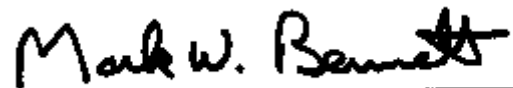
1. IPAS's July 9, 2001, motion for modification of ruling is **denied** *except* as to the modification of paragraph 3(a) of the preliminary injunction specified herein.

2. Gerard's July 9, 2001, motion to alter or amend seeking clarification of statutory construction and its alternative motion for an extension of time are **denied**.

3. The stay on the preliminary injunction set forth in this court's June 25, 2001, order is **hereby lifted**. The **preliminary injunction**, as modified below, **shall accordingly issue** at this time.

IT IS SO ORDERED.

DATED this 17th day of July, 2001.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line underneath it.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
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IOWA PROTECTION AND
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Plaintiff,

vs.

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L.L.C.,

Defendant.

No. C 01-3013-MWB

PRELIMINARY INJUNCTION

WHEREAS, this matter came before the court on the April 2, 2001, request by plaintiff Iowa Protection & Advocacy Services, Inc. (IPAS), for a preliminary injunction,

AND WHEREAS, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the court finds that past and future interference by defendant Gerard Treatment Programs, L.L.C. (Gerard), with IPAS's access to residents, residents' records, and facilities at Gerard's facility in Mason City, Iowa, would impose irreparable harm or injury or the threat of such irreparable harm or injury upon IPAS's activities under the Protection and Advocacy for Mentally Ill Individuals Act of 1986, as amended in 1991 (PAMII Act), 42 U.S.C. § 10801 *et seq.*, and provisions of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DDA), 42 U.S.C. § 15043 (repealing, revising, and recodifying 42 U.S.C. § 6042, the pertinent provision of the Developmental Disabilities Act of 1984, as amended), and upon further consideration of all other relevant factors,

DEFENDANT GERARD TREATMENT PROGRAM, L.L.C. (GERARD), is hereby **preliminarily enjoined**, as follows:

1. Gerard is enjoined from preventing or interfering with access by IPAS to the

residents, records of residents, and facilities of Gerard's institution in Mason City, Iowa.

2. Gerard shall provide IPAS with access to residents and records of residents at Gerard's facility in Mason City, Iowa, upon IPAS providing Gerard with notice of the following:

- a. the date on which IPAS contacted or attempted to contact a patient's representative with an offer of assistance and request for consent to access;
- b. whether or not the representative responded to the contact by a deadline set forth in IPAS's request for consent and offer of assistance; and
- c. whether, if a response was received, the representative gave consent to IPAS's access or expressly declined to give such consent.

Where these notice requirements are satisfied, Gerard shall provide access to residents and records of residents, even if objections are made by a resident's parent, guardian, guardian ad litem, or other legal representative.

3. Gerard shall provide IPAS with access to residents, records, and facilities of Gerard during normal business and visiting hours of Gerard. However, access during other times shall not be unreasonably withheld by Gerard.

- a. Gerard shall provide IPAS with access to records within twenty-four hours of presentation of the notice prescribed in paragraph 2 above.
- b. Gerard shall provide IPAS with access to residents upon presentation of the notice of contact with a resident's guardian as prescribed in paragraph 2 above and upon twenty-four (24) hours notice to Gerard of a request by IPAS to interview a named resident.

To the extent possible, all activities by IPAS shall be conducted so as to minimize interference with Gerard's programs and any inconvenience or distress to residents.

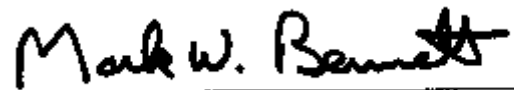
This preliminary injunction shall be binding upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active

concert or participation with them who receive actual notice of this order.

This preliminary injunction shall issue without the posting of any bond or security by plaintiff herein.

IT IS SO ORDERED.

DATED this 17th day of July, 2001.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line underneath it.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA